

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE COMMISSIONER OF VETERANS AFFAIRS

John A. Bukovich,
Petitioner,
v.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

City of Lake Shore,
Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on July 7, 2004, at the Nisswa Community Center, 25628 Main Street, Nisswa, MN 56468. Per the post-hearing scheduling agreement, the parties submitted closing arguments in writing on July 30, 2004, and Respondent submitted a reply brief on August 9, 2004. The hearing record of the Office of Administrative Hearings closed on August 9, 2004.

Patrick M. Krueger, Borden, Steinbauer, Krueger & Knutson, 302 South Sixth Street, PO Box 411, Brainerd, MN 56401, appeared on behalf of Petitioner John Bukovich.

Julie Fleming-Wolfe, 1010 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101, appeared on behalf of Respondent City of Lake Shore.

NOTICE

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This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make a final decision after a review of the record. The Commissioner may adopt, reject or modify this Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this report to file exceptions and present argument to the Commissioner. Parties should contact Clinton Bucher, Department of Veterans Affairs, Room 206C, 20 West 12th St., St. Paul, MN 55155-2079, (651) 284-3408, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

- Did Petitioner's contract position as Chief of Police of Lake Shore expire in August, 2003, or was he "removed" as defined under the Veterans Preference Act?

Was Petitioner a "department head" under the Veterans Preference Act, and therefore not subject to the notice and hearing provisions of the Act?

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner John A. Bukovich is an honorably discharged veteran of the United States Marine Corps.

2. Petitioner began working as a Police Officer for Respondent City of Lake Shore in September, 1983, at which time he was the only police officer employed by the City.^[1] Petitioner had completed some college coursework and satisfied the P.O.S.T. (Peace Officer Standards and Training) Board training requirements.

3. In the late 1980's, due to Petitioner's status as the only police officer in Lake Shore, the City requested that Petitioner's title be changed to Chief of Police.^[2]

4. As Police Chief, Petitioner worked under the administrative direction of the City Council, and he exercised authority over the other police officers in the City.^[3] His job duties included planning, organizing, and directing the work of the police department; developing and overseeing policies, procedures and practices for the department to ensure a safe and efficient operation; and supervising the small staff of the police department including interviewing and recommending hiring, assigning, scheduling and reviewing work, rewarding and disciplining, training and recommending dismissal.^[4] Minimum qualifications for the position included, among other things, an associate degree in law enforcement and three years experience as a police officer.

5. The City Council adopted Resolution No. 8:88 – Resolution Establishing Basic Police Policy Procedures on April 24, 1995, which documented, in relevant part, the chain of command as to the Chief of Police. The Resolution makes the Chief of Police responsible for his department with regard to issues of interpretation of policies or any other issues needing clarification.^[5] The chain of command from the top down is City Council, Council Liaison, Acting Mayor, Mayor, and Chief of Police or any other city department heads.

6. On May 22, 1995, the City and Petitioner entered into an employment agreement with the following relevant terms, to ensure that Petitioner could be fired only for just cause:^[6]

Scope of Employment and Compensation. The employment of Employee by the City shall be governed by the basic personnel policy adopted by the City on January 1, 1994, as amended, and Resolution No. 8:88 of the City of Lake Shore, a Resolution establishing basic police policy procedures, as amended. In addition to the duties and obligations under the basic personnel policy and Resolution 8:88, the Employee shall be compensated \$45,000.00 per year plus cost of living increases during the term of this Agreement.

. . .

Option to Renew. Upon expiration of the four-year term of this Agreement, the Employee may renew this Agreement for a successive four-year term.^[7]

7. In May, 1997, Petitioner interviewed Steve Sundstrom and hired him as a part-time police officer for the City.^[8] The hiring decision did not go before the City Council until a couple of weeks later when Petitioner sought to promote Sundstrom into a recently opened full-time position. Shortly after, Sundstrom became a full-time police officer for the City.

8. In August, 1998, Petitioner's Employment Agreement was nearing an end under the terms of the 1995 contract. Petitioner met with the City Council in a special meeting to discuss renewal of his Employment Agreement. At that meeting, Petitioner presented his position regarding his salary, explaining that he was considering retiring in five years, and that he wanted his new salary to boost his "high-five" for retirement payout purposes.^[9] Accordingly, Petitioner pushed for a five-year contract, instead of another four-year term. The resulting Employment Agreement, dated August 24, 1998, was a five-year contract and set Petitioner's salary at \$49,857.60 per year, with a two percent increase annually.^[10] By agreement of the parties, the contract did not contain an option to renew.^[11]

9. Prior to 2000, Petitioner hired part-time police officers for the City without City Council approval (per his job description).^[12] When Teri Hastings became the City Administrator in 2000, she implemented personnel policies that had only been loosely followed until that time, including stricter hiring procedures.^[13] Accordingly, after that time, the City Council had final approval on the hiring or firing of any new police officers brought before them by Petitioner.

10. In 2000, Petitioner became interested in running for election to the City Council. Council members requested advice from the Attorney General's Office, who sent them an advisory opinion on the compatibility of one individual holding a council

position as well as being chief of police.^[14] At the City Council meeting on November 27, 2000, Council members discussed the matter at length and finally concluded that the two positions were not compatible. Those present at the meeting concluded that the Police Chief does not determine public policy but that he does make final decisions for his department, so that it would be inappropriate for the Chief of Police to vote on issues related, directly or indirectly, to his department.

11. In 2001, Officer Sundstrom was promoted to Sergeant.^[15] The year before, he took all the BCA management course offerings in anticipation of being promoted.^[16] As Sergeant, according to the job description dated October 22, 2001, Sundstrom worked under the general and technical supervision of Petitioner, or the City Administrator in Petitioner's absence.^[17] Additionally, Sundstrom was expected to supervise other subordinate officers as directed by Petitioner, or the City Administrator in his absence. During this period, there were as few as one and as many as three part-time officers working for the police department. Petitioner and Sergeant Sundstrom were the only two full-time officers.^[18]

12. Petitioner attended City Council meetings on a consistent basis, and gave an update at each meeting on the police department and any police reports for the month.^[19] On August 22, 2002, the City Council approved Petitioner's request to hire two part-time officers contingent upon the City's receipt of grant money from the U.S. Department of Justice.

13. The City Council put Petitioner on paid leave as of July 20, 2003, due to the pending investigation of a number of allegations against Petitioner.^[20]

14. At the August 25, 2003, City Council meeting, Petitioner was not present and the Council discussed his Employment Agreement, which was due to expire that month. Council members discussed the implications of renewing Petitioner's contract until the investigation was completed.^[21] One member, John Terwilliger, stated that the contract renewal was not based on the pending investigation, but on the terms of the contract.^[22] Mr. Terwilliger made a motion not to renew Petitioner's contract, which passed with one dissenter. Petitioner's employment with the City ended on August 31, 2003.

15. Petitioner filed a Petition for Enforcement of Veteran's Preference Act pursuant to Minn. Stat. § 197.481, dated March 5, 2004, asking the City to provide him with a hearing to determine the validity of his discharge and to compel the City to reinstate his full salary and benefit package as of September 1, 2003.

16. The Department of Veterans Affairs issued a Notice of Petition and Order for Hearing on March 30, 2004.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Pursuant to Minn. Stat. §§ 14.50 and 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter.

2. The Department of Veterans Affairs has complied with all procedural and substantive requirements of law or rule. In all respects, the Notice of Hearing was proper as to form and content.

3. Petitioner is an honorably discharged veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447, entitled to all benefits and protections of the Minnesota Veterans Preference Act.

4. Respondent is a political subdivision in the State of Minnesota within the meaning of Minn. Stat. § 197.46.

5. The Veterans Preference Act allows removal of a veteran from his position of employment only for incompetency or misconduct after a hearing, upon due notice of the charges, in writing. Judicial precedent has created a third basis, authorizing the abolishment of a position held by a veteran if the public employer acts in good faith.

6. The Veterans Preference Act does not apply to employment that is temporary in nature because otherwise it would interfere with the employer's administrative discretion to set specific terms of employment.^[23]

7. At the August 11, 1998, City Council meeting, Petitioner and the Council members agreed to Petitioner's continued employment until August 2003, for the benefit of his retirement. The parties further explicitly agreed to remove the option to renew that had been included in the 1995 Employment Agreement. The term of Petitioner's employment became fixed at that time. Thus, his employment ended August 31, 2003, pursuant to the Employment Agreement. He was not "removed."

8. The Veterans Preference Act exempts "department heads" from the requirement that a veteran be given notice of a right to hearing to establish incompetency or misconduct prior to termination of his employment.^[24]

9. The *McGinnis* case sets forth eight factors to be analyzed as to whether an individual is a "department head":

- (1) Does the alleged department head have charge of the work done by his department?
- (2) Does his work require technical, professional training?
- (3) Is he the highest authority at that level of government as to his official duties?
- (4) Does he supervise all of the work in his department?

- (5) Does the success of his department depend on his technique?
- (6) Are the employees in the department under his direction?
- (7) Are his duties more than merely different from other employees?
- (8) Does he have the power to hire and fire subordinates?

10. The burden of proof is upon the City to establish that Petitioner was a department head who is exempt from the notice requirement of the Veterans Preference Act. ^[25]

11. The City of Lake Shore has demonstrated that Petitioner was a department head under the meaning of the Veterans Preference Act.

Based on the above-mentioned Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs dismiss the petition of Petitioner John Bukovich.

Dated: August 31, 2004

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

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MEMORANDUM

Removal Issue

Any comments at the meeting by Council members as to Petitioner negotiating another contract after the five years really only serve to demonstrate that the parties understood that the contract would expire after a period of five years. At no time did Petitioner indicate to the Council that he wanted to renew his contract as expiration neared. Petitioner was not removed from his position as Police Chief for the City of Lake Shore because he was a contract employee whose employment ended pursuant to the terms of his contract.

Department Head Issue

An analysis of the *McGinnis* factors demonstrates that Petitioner was a department head at the time his employment with the City ceased.

Did Petitioner have charge of the work done by the police department?

Did Petitioner supervise all of the work in his department?

Were the employees in the department under his direction?

Both the Police Chief Job Description^[26] and the Resolution Establishing Basic Police Policy Procedures^[27] make clear that the City Council intended the Police Chief to have charge over the work done by the police department. The Resolution makes the Chief of Police “responsible for his or her Department . . . with regard to issues of interpretation of these policies or other issues desiring clarification by the Police Department.”^[28] Furthermore, the job description lists the development and oversight of policies and procedures for the department as a typical duty performed by the Police Chief. The testimony of Mayor Don McFarland and Terri Hastings is evidence that Petitioner actually fulfilled those responsibilities in his position as Police Chief.^[29]

The job description states that the Police Chief is to plan, organize, and direct the work of the department. More specifically, the Resolution mandates that the Police Chief will schedule the employees of the department, considering the cost to the City as well as the safety and protection of its residents.^[30] Petitioner was, in fact, in charge of scheduling his officers and approving or disapproving requested leave time.^[31] Additionally, Petitioner coordinated the mandatory P.O.S.T. Board training required of his officers and himself, and he was in charge of verifying and reporting the completion of the training to the Board.^[32] While some of the officers in the department may have had to report to the City Administrator on occasion, those instances arose only when Petitioner was unable or unavailable to be on the job.

Petitioner had charge of the City’s Police Department, and supervised and directed the Department’s employees.

Did Petitioner’s work require technical and professional training?

The City’s actions regarding the current Chief of Police, Steve Sundstrom, demonstrate that additional technical or professional training was, at the very least, desired by the City Council. Mayor McFarland testified that the City Council “raised him” and made Sundstrom Chief of Police.^[33] Part of this “grooming” into the Police Chief position included more than 100 hours of training for Sundstrom in supervision during 2000.^[34]

Was Petitioner the highest authority at this level of government as to his official duties?

Were Petitioner’s duties more than merely different from other employees?

As discussed above, both the Resolution and the job description describe Petitioner as being in charge of the police department. And while the Resolution establishes a chain of command, with Petitioner not at the top, the duties assigned to Petitioner make clear that his duties were more than merely different from the other department employees. The job description required Petitioner to “oversee” or conduct investigations. The Resolution directed Petitioner to give monthly reports to the City Council on behalf of the police department. Petitioner fulfilled this requirement on a routine basis.^[35] The Resolution also makes repeated distinctions between the Police Chief and patrolmen, again establishing the difference between the two positions. Petitioner had authority to and did offer input into the police department’s budget and job descriptions.^[36] In addition, Petitioner was instrumental in applying for and obtaining federal grant funds for the department. Because of his efforts, the City Council approved his request to hire two new part-time peace officers for the City.^[37] Petitioner also could make recommendations regarding the rank of officers in the department.^[38] These types of duties were not included in the job descriptions of the other officers in the department.^[39]

Each of these examples demonstrates that Petitioner’s duties were more than merely different from the other department employees.

Did the success of the police department depend on Petitioner’s technique?

The manner in which Petitioner performed all of the duties discussed above undoubtedly had a direct impact on the police department and the public’s perception of it. The success of the department depends also on its public programs, and the Resolution puts the Police Chief directly in charge of such programs. Mayor McFarland, Steve Sundstrom, and Terri Hastings all testified that the success of the department depended on Petitioner’s job performance.^[40]

Did Petitioner have power to hire and fire subordinates?

The job description states the Police Chief’s supervision duties include “interviewing and recommending hiring, . . . rewarding and disciplining, training, and recommending dismissal.”^[41] Petitioner played a key role in recommending individuals for hire and he was in charge of selecting and hiring most part-time officers.^[42] Terri Hastings testified at length about Petitioner’s involvement in the hiring process from selecting candidates, to interviewing and recommending hiring.^[43] Furthermore, Mayor McFarland testified that discipline was Petitioner’s responsibility.^[44] While there were some parameters on Petitioner’s ability to hire and fire employees of the police department, overall, he played a substantial role in the process. This factor, along with the seven discussed above, all indicate that Petitioner was a “department head” under the meaning of the Veterans Preference Act.

S.M.M.

^[1] Transcript at 179.

[2] Tr. at 179. Petitioner testified that the primary reason behind the request was that the Bureau of Criminal Apprehension (BCA) and the P.O.S.T. Board needed a contact person in the Police Department of Lake Shore to whom they could address correspondence and inquiries.

[3] Ex. 3.

[4] Ex. 3; Tr. at 45-47, 99.

[5] Ex. 14.

[6] According to Mayor McFarland and Council member John Solsten, they were unaware that termination of Petitioner's employment was already governed by the "just cause" standard. Tr. at 18-19, 65-66, 72.

[7] Ex. 4.

[8] Tr. at 74-75.

[9] Tr. at 161-63. Ex. 16.

[10] Ex. 1. The two percent annual increase was unique to Petitioner's contract; other employees of the police department did not receive this type of pay increase. Tr. at 163-64.

[11] Tr. at 164-65. Ex. 16.

[12] Tr. at 84.

[13] Tr. at 84.

[14] Ex. 15 at 5-7.

[15] Tr. at 74.

[16] Tr. at 76.

[17] Ex. 8.

[18] Sundstrom testified that Petitioner was "grooming" him for the Police Chief position starting back in 1997. Tr. at 75. Petitioner, conversely, testified that he knew nothing of Sundstrom's promotion to Sergeant until after the promotion had already been made. Tr. at 199.

[19] Ex. 2.

[20] Tr. at 129-30.

[21] Tr. at 132.

[22] Ex. 13 at 3.

[23] *Curkovich v. Ind. School Dist. No. 701*, 273 Minn. 518, 521, 142 N.W.2d 284, 286 (1966).

[24] *State ex rel. McGinnis v. Police Civil Service Commission of Golden Valley*, 253 Minn. 62, 73, 91 N.W.2d 154, 161 (1958), *citing State ex rel. McOske v. City Council*, 167 Minn. 240, 208 N.W. 1005 (1926).

[25] *Holmes v Wabasha County*, 402 N.W.2d 643 (Minn. Ct. App. 1987).

[26] Ex. 3.

[27] Ex. 14.

[28] Ex. 14 at 1.

[29] Tr. at 42, 123.

[30] Ex. 14 at 2-3.

[31] Tr. at 39-40, 106-07.

[32] Tr. at 42-43, 86-87, 108. Ex. 14 at 5.

[33] Tr. at 26.

[34] Tr. at 90.

[35] Tr. at 34.

[36] Tr. at 27-28, 101, 109.

[37] Tr. at 31-35, 104.

[38] Tr. at 95.

[39] Exs. 5, 8.

[40] Tr. at 43, 82, 115.

[41] Ex. 3 at 1.

[42] Ex. 2. Tr. at 75-76, 84. Refer to Finding of Fact No. 9 for limitations on Petitioner's hiring and firing authority.

[43] Tr. at 118-22.

[44] Tr. at 38.